FILED
DEC 10 1992
OFFICE OF THE CLERK

No. 92-1014

In The

Supreme Court of the United States

October Term, 1992

SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS,

Petitioner,

v.

COALITION FOR CLEAN AIR, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

COLIN LENNARD*
BURKE, WILLIAMS & SORENSEN
611 W. Sixth Street
Suite 2500
Los Angeles, California 90017
(213) 236-0600

HELENE SMOOKLER
Counsel
Southern California
Association of Governments
818 W. 7th St., 12th Fl.
Los Angeles, California 90017
(213) 236-1800

Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Despite Congress's determination that the development of local air pollution control measures is initially the responsibility of State and local governments, is EPA required to promulgate a federal air pollution control plan in Southern California because EPA found in 1988 that California failed to meet air attainment requirements which have now been repealed by the 1990 Clean Air Act Amendments and replaced with new requirements which Southern California has not yet had the opportunity to meet.

PARTIES TO THE PROCEEDINGS BELOW

The appellants before the court of appeals in No. 91-55383 were the Coalition for Clean Air and Sierra Club, Inc. The appellant before the court of appeals in No. 91-55386 was the South Coast Air Quality Management District. The appellees in both cases were the United States Environmental Protection Agency (EPA), William K. Reilly, Administrator, Daniel G. McGovern, Regional Administrator, and David P. Howekamp, Director, Air and Toxics Division, EPA Region IX.

The Southern California Association of Governments intervened in the court of appeals in support of EPA. The Environmental Council of Sacramento and Sierra Club, Inc. participated in the court of appeals as *amici curiae* in support of the appellants.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW..... ii

OPINIONS BELOW..... 1

JURISDICTION..... 2

STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT 3

REASONS FOR GRANTING THE PETITION 3

CONCLUSION 10

TABLE OF AUTHORITIES

Page

STATUTES

UNITED STATES

28 U.S.C.
§ 1254(1) 2

42 U.S.C.
§ 7401 ..... 2, 4

§ 7504 2

CALIFORNIA

CAL. HEALTH & SAFETY CODE
§ 40460 ..... 2, 4

§ 40460(b) 4

§ 40463 ..... 2, 4

§ 40464 ..... 2, 4

§ 40465 ..... 2, 5

§ 40911 *et seq.* 5

No. _____

In The

Supreme Court of the United States

October Term, 1992

SOUTHERN CALIFORNIA ASSOCIATION OF GOVERNMENTS,

Petitioner,

v.

COALITION FOR CLEAN AIR, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

The Southern California Association of Governments ("SCAG"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 971 F.2d 219. The opinion of the district court is reported at 762 F.Supp. 1399. The opinions are contained in the appendix to petition for writ of certiorari (App. 1a-43a)

filed in this matter by the Solicitor General on behalf of the Environmental Protection Agency, et al. ("EPA's Petition").

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1992. A petition for rehearing was denied on September 11, 1992. (EPA's Petition, App. 44a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Clean Air Act, 42 U.S.C. § 7401 *et seq.*, as amended, are contained in the appendix to EPA's Petition. (App. 45a-47a.) Pursuant to section 174(a) of the Federal Clean Air Act, 42 U.S.C. § 7504, SCAG has been designated as one of the co-lead agencies responsible for development of the nonattainment air plans for the South Coast Air Basin.

The California statutes which mandate that SCAG participate in the process of preparing elements to be included in the State Implementation Plan ("SIP") for the South Coast Air Basin, Cal. Health & Safety Code §§ 40460, 40463, 40464, 40465, are reproduced in the appendix to this petition. (App. A1-A4.)

STATEMENT

SCAG hereby adopts the STATEMENT contained in EPA's Petition.

REASONS FOR GRANTING THE PETITION

SCAG concurs in, and adopts the interpretation of, the Clean Air Act and the 1990 Amendments in the REASONS FOR GRANTING THE PETITION contained in the EPA's Petition. SCAG petitions for a writ of certiorari independently of EPA to address the appropriate division of responsibility between the federal, state and local governments under the Federal Clean Air Act. SCAG wishes to emphasize the extremely important issue of state and local agency involvement in plan preparation, and the practical impacts of the court of appeals' decision on agencies like SCAG if they are precluded from primary involvement and full participation in the development of a plan to reduce emissions as contemplated by the Federal Clean Air Act and the 1990 Amendments. SCAG contains six counties, over a hundred cities and a population of approximately fifteen million.

SCAG is a duly constituted joint powers agency under California law, a regional governmental body, and the federally designated Metropolitan Planning Organization representing the Southern California counties of Los Angeles, Orange, San Bernardino, Riverside, Ventura, and Imperial, and most of the cities within those counties. As the regional council of governments, SCAG is independently responsible for a number of regional activities,

including transportation planning, water planning, housing needs planning, and air quality planning. SCAG also is responsible for preparing that portion of the Air Quality Management Plan for the South Coast Air Basin ("AQMP") which will become a part of the SIP for the South Coast Air Basin. The Ninth Circuit's opinion detrimentally affects SCAG's ability to perform its statutory obligations in some important ways which are different from and independent of the detriment suffered by EPA, as discussed below.

In connection with the implementation of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, SCAG has been charged by California's legislature, in coordination with cities and counties in the South Coast Air Quality Management District ("SCAQMD"), with the independent preparation of certain SIP elements for California's attainment of national ambient air quality standards ("NAAQS") for all criteria pollutants in the South Coast Air Basin. Cal. Health & Safety Code § 40460 (App., *infra*, A1-A2.) Specifically, SCAG is required to prepare and approve those elements relating to regional demographic projections and integrated regional land use, housing, employment and transportation programs, measures and strategies, and to provide related emissions data. California Health & Safety Code § 40460(b). (App., *infra*, A1.) SCAG also is charged with providing updated information with respect to these elements. California Health & Safety Code § 40463. (App., *infra*, A2-A3.) SCAG must coordinate the input of cities and counties in developing the elements for which it is responsible. California Health & Safety Code § 40464. (App., *infra*, A4.) SCAQMD must incorporate the elements prepared by SCAG into the AQMP, and

forward it to the California Air Resources Board for review and inclusion in California's SIP. The state's SIP subsequently is submitted to EPA. Cal. Health & Safety Code § 40465. (App., *infra*, A4.)

In accordance with its statutory mandate, SCAG has proposed measures necessary to achieve and maintain state and federal ambient air quality standards in the South Coast Air Basin. On March 17, 1989, SCAQMD adopted a revision to the AQMP for the South Coast Air Basin. After approval by the California Air Resources Board, the AQMP was submitted to EPA on August 18, 1989, as a revision to California's SIP. Under regulations proposed in the revised SIP, SCAG would coordinate an extensive transportation and land-use management program, SCAQMD would control emissions produced by industrial and commercial sources, and the California Air Resources Board would oversee reductions in emissions from consumer products and mobile sources. Prior to the enactment of the 1990 Amendments, California submitted the revised SIP for EPA's consideration and approval. As of this date, EPA has neither approved nor disapproved California's latest SIP submittal.

SCAG also has complied with the California Clean Air Act which requires local air districts along with councils of governments, such as SCAG, to prepare a similar plan for attainment of NAAQS. Cal. Health & Safety Code § 40911 *et seq.* SCAG approved and the California Air Resources Board has adopted, in October, 1992, a plan imposing obligations on local agencies within the South Coast Air Basin to meet air quality attainment requirements of the California statute.

SCAG has proposed measures, as required, necessary to achieve and maintain state and federal ambient air quality standards in the South Coast Air Basin. Most of the work on the matters which are necessary in order to develop a realistic attainment plan has been completed or is in the process of being completed.

The court of appeals' decision has significant consequences adversely affecting the ability of local agencies to attain NAAQS. The decision usurps the primary role of state and local agencies in controlling emissions, and decreases the likelihood that the goals of the Clean Air Act will be met. In addition to frustrating the goals of the Clean Air Act, the decision will affect most, if not all, Californians in the South Coast Air Basin (and the Sacramento and Ventura areas as well)[1] on a personal level. EPA-mandated control measures could result in severe economic and social consequences. Congress in adopting the 1990 Amendments, recognized that such severe economic and social dislocations should be avoided. In furthering this goal, Congress designated state and local agencies to be the primary source of the plan, relegating to EPA a secondary "backstop" role.

Achievement of NAAQS will depend significantly on the ability of each local jurisdiction to implement control measures contained in a plan. For implementation to be

---

[1] This litigation will resolve not only the instant action, but will serve as precedent for other actions involving the Sacramento area, *Environmental Council of Sacramento v. EPA*, Civ. No. S-87-420 EJG (E.D. Cal. Dec. 2, 1991), *aff'd*, No. 92-15293, and the County of Ventura, *Citizens to Preserve the Ojai v. EPA*, No. CV-88-00982 HLH (C.D. Cal. March 13, 1991).

successful, control measures imposed on a city, for example, the size of Lomita in Los Angeles County (population 19,555) must necessarily be different than those imposed on, for example, the City of Los Angeles, with its 3 million plus residents and its correspondingly larger financial and resource capabilities. A city with a large industrial base such as Vernon should be subject to different control measures than a largely residential city such as Palos Verdes Estates. Similarly, rural and urbanized cities should be subject to different control measures to meet air quality attainment standards.

EPA does not have the knowledge or resources to design a plan that would be responsive to the important differences among the local jurisdictions. An example of the type of control measure EPA would adopt is gasoline rationing. 41 Fed. Reg. 45,565 (1976). While this draconian measure is as unlikely to be implemented now, if proposed, as when EPA proposed it, it exemplifies the type of unworkable, unattainable measure which fails to recognize the diversity among the local jurisdictions within the South Coast Air Basin and which is likely to be mandated by EPA if that entity is required to be primarily responsible for preparation of a plan for the South Coast Air Basin. State and local agency participation in the development of a plan pursuant to the newly adopted time limits and standards contained in the 1990 amendments to the Clean Air Act will ensure that the vast differences in the local jurisdictions in the South Coast Air Basin will be duly considered and the likelihood of achieving NAAQS substantially improved. These agencies for several years have been collecting and analyzing data concerning land use, transportation, demographics

and other information necessary to develop a workable plan to achieve NAAQS.

Further, a plan developed by EPA without primary input from state and local agencies could, and probably would, overlap, conflict with and duplicate the air plans already developed by the state and local agencies under the California Clean Air Act and the Federal Clean Air Act, causing needless expenditure of public funds, unnecessary confusion as to which plan to follow, and unnecessary delay in attainment of NAAQS.

SCAG has a vital interest in coordinating and representing the interests of affected local governments in connection with the imposition of air quality requirements in the South Coast Air Basin. If the court of appeals' decision is permitted to stand, it will impair SCAG's ability to take advantage of the opportunity to prepare and suggest air attainment strategies as authorized and encouraged under the new provisions of the 1990 Federal Clean Air Act Amendments. SCAG's input under the new time limitations established by the 1990 Amendments to the Federal Clean Air Act will ensure the involvement of the impacted Southern California counties and cities in air quality planning and implementation in the South Coast Air Basin.

The better construction of the Federal Clean Air Act, and the one clearly contemplated by Congress, is one which allows state and local agencies to perform the functions of developing a plan and delegates to EPA the role of reviewing the plan. Enforcing the terms of the Settlement Agreement requiring EPA to prepare a plan in the first instance would require needless expenditure of

taxpayer funds to enforce time limitations and attainment standards that have been repealed by Congress because such time limitations and standards proved to be unwise and unattainable. As congently observed by Judge Noonan in his dissent to the court of appeals' majority opinion: "It would . . make nonsense of the new law to hold that the old disapproval must continue in effect despite the relaxation of the standards effected by the 1990 changes." (EPA Petition, App. 31a.)

If permitted to stand, the Court of Appeals' decision will deprive state and local air quality planning agencies such as SCAG the opportunity to prepare, suggest and implement air pollution control strategies. SCAG believes Congress intended that state and local agencies prepare air pollution control plans in the first instance. Thus, the Court of Appeals' decision turns the Act on its head by mandating EPA promulgation of a FIP at this time, thereby denying the state and local agencies in Southern California the ability to plan and develop air attainment strategies in the time frame and manner specifically authorized under the 1990 Amendments to the Federal Clean Air Act.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court may wish to consider summary reversal.

Respectfully submitted,

COLIN LENNARD
BURKE, WILLIAMS & SORENSEN

HELENE SMOOKLER
Counsel, Southern California Association of Governments

December 10, 1992

APPENDIX A

§ 40460. (a) No later than January 31, 1979, the south coast district board shall adopt a plan to achieve and maintain the state and federal ambient air quality standards for the South Coast Air Basin. The plan shall be revised and adopted by the south coast district board by January 31, 1982, according to a schedule consistent with subdivision (a) of Section 40463. The plan revisions shall be compiled by the south coast district board, with the cooperation of the state board and the Department of Transportation, and the active participation of the Southern California Association of Governments and the counties and cities within the South Coast Air Basin.

(b) With the assistance of counties and cities, the Southern California Association of Governments shall have responsibility for preparing and approving the portions of the plan relating to regional demographic projections and integrated regional land use, housing, employment, and transportation programs, measures, and strategies. The Southern California Association of Governments shall analyze and provide emissions data related to its planning responsibilities.

(c) The south coast district shall have the responsibility for preparing and analyzing the portions of the plan elements relating to existing air quality, emissions data, results of air quality modeling, and stationary source control measures. The south coast district shall combine its portion of the plan with those prepared by the Southern California Association of Governments.

In consultation with the south coast district board, the Southern California Association of Governments, and

other appropriate local agencies, the state board shall provide the emissions reductions attributed to technological vehicular source control strategies included in the plan.

(d) Upon adoption by the state board, the plan and future revisions shall be the air quality management plan and, as submitted to the Environmental Protection Agency, the federally required state implementation plan for the South Coast Air Basin. Notwithstanding any other provision of this division, the state implementation plan for the air basin shall only include those provisions necessary to meet the requirements of the Clean Air Act (42 U.S.C. Sec. 7401 et seq.).

---

§ 40463. (a) The plan shall be formally reviewed every two years beginning in 1982 by the agencies responsible for preparing plan revisions. In the event of revisions, the compliance schedules and emission limitations shall be amended to reflect advances in technology, control strategies, and administrative practices. The south coast district board may delay submittal of revisions up to two years if necessary to synchronize with the dates of submittal required under the Clean Air Act (42 U.S.C. Sec. 7401 et seq.).

(b) With the active participation of the Southern California Association of Governments, a South Coast Air Basin emission carrying capacity for each state and federal ambient air quality standard shall be established by the south coast district board for each formal review of

the plan consistent with subdivision (a) and shall be updated to reflect new data and modeling results. A carrying capacity is the maximum level of emissions which would enable the attainment and maintenance of an ambient air quality standard for a pollutant. Emission carrying capacity for state standards shall not be a part of the state implementation plan requirements of the Clean Air Act for the South Coast Air Basin.

(c) The state board shall review and comment, within 60 days of submittal by the south coast district, on the emission carrying capacity, air quality model selection, and all other data required by this section. The south coast district board and the Southern California Association of Governments Executive Committee shall consider the comments of the state board and shall either accept the state board's recommendations regarding carrying capacity or shall advise the state board that the recommendations are not accepted.

(d) If the state board receives notification that its recommendations are not accepted, the state board shall convene a conflict resolution committee within 30 days to attempt to resolve the differences. The committee shall be composed of two members each of the state board, the Executive Committee of the Southern California Association of Governments, and the south coast district board appointed by the entity they represent. The committee shall make a recommendation to the three governing boards.

§ 40464. The Southern California Association of Governments shall coordinate the efforts of the counties and cities in the process of developing and reviewing plan elements which meet the requirements of the plan, state and federal law, and local needs relating to transportation, land use, demographic projections, employment, housing, and other matters of local concern.

---

§ 40465. The Southern California Association of Governments shall submit its plan elements to the south coast district board by June 1 of each odd-numbered year, except in the case of a delayed submittal as provided in subdivision (a) of Section 40463, for incorporation into the air quality management plan. The district shall combine the association's plan elements with the south coast district elements as specified in subdivision (a) of Section 40460. Each agency shall prepare and submit all necessary documentation, including that of public and intergovernmental involvement.